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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

JOSEPH CAHILL,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF UNITED WAY OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITION OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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INTEREST OF *AMICUS CURIAE*

United Way of America ("United Way") is a national nonprofit charitable organization with over two thousand local member agencies throughout the nation, including seventy members in the State of New York. United Way's local member agencies support more than 37,000 voluntary

health and welfare agencies, which in turn provide human care services to more than 35,000,000 families and individuals, without regard to race, religious belief, or national origin. United Way's local member agencies receive substantial charitable contributions from public utility companies. These corporate contributions totaled over $29 million in 1986. Such contributions could be seriously jeopardized if the decision of the New York Court of Appeals were allowed to stand.

SUMMARY OF ARGUMENT

It is axiomatic that a private business does not deprive an individual of his rights unless state action is involved. *Consolidated Edison Co. of New York, Inc.* v. *Public Service Commission of New York*, 477 U.S. 530, 553 (1979) (Blackmun, J., dissenting). In this case, the New York Court of Appeals has erroneously attempted to characterize the fundamentally private decisions of the utilities regarding charitable contributions as acts of the State of New York, based solely on the Public Service Commission's policy of permitting limited contributions to be included in the rate base. However, the mere fact that a utility is publicly regulated does not turn its normal business expenditures into "state action." Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee*, 55 U.S.L.W. 5061, 5067 (U.S. June 25, 1987). Nor does mere approval of a utility's practice by a regulatory commission "transmute a practice initiated by the utility and approved by the Commission into 'state action'." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1979).

The Public Service Commission has done no more than authorize a normal and reasonable business practice of regulated and unregulated businesses alike, which benefits the utility, its ratepayers, and the community in

which it resides and does business. As Judge Titone of the Court of Appeals stated in dissent:

> ". . . if the regulatory powers of the State were not involved in the rate-setting process, utility companies, like most unregulated business concerns, would simply include in the price for their services the cost of whatever charitable donations they may choose to make. By allowing these utilities to engage, to a limited extent, in a business practice that they would naturally have pursued if there had been no State involvement at all, the PSC has done no more than merely refuse to interfere with what is essentially a private decision." (App. A16 to A17.)

United Way, on behalf of its member agencies, submits that conduct of the Public Service Commission does not constitute "state action," and therefore urges that the petition seeking review of the decision of the New York Court of Appeals be granted and that the court's decision be reversed.

ARGUMENT

I. CONTRIBUTIONS BY UTILITIES TO LOCAL UNITED WAY AGENCIES ARE DECISIONS AND ACTIONS SOLELY WITHIN THE PRIVATE SECTOR

The attempt by the Court of Appeals to find "state action" in the policy of the New York Public Service Commission permitting utilities to treat charitable contributions as a legitimate cost of providing services, just as nonregulated businesses do, is highly unrealistic as well as contrary to law.

"Charitable contributions" by utility companies to organizations such as local United Way agencies are not merely "giveaways," but rather are investments in the communities in which these companies and their employees reside, which inure to the benefit of the donor as well as the donee. By contributing to local health and welfare agencies, utilities not only help to provide services from

which their employees and ratepayers directly benefit, but also help ensure the viability of the communities in which they operate.

For example, local United Way agencies support job training and placement programs, and day-care programs, which not only improve the work force in the community, but may, by making ratepayers more self-sufficient, help insure that utility bills are paid. Local fuel funds serve a similar purpose. Charitable contributions to local United Way agencies also go to fund community mental health programs, cancer screening programs, American Heart Association public education programs, and many other health services, which help reduce the utility's direct costs of providing medical care to its own employees. Local United Ways support programs providing community youth services, and addressing problems of homelessness, hunger, unemployment and alcoholism, which, by helping to reduce vandalism and urban blight, not only reduce the utility's maintenance and repair expenses, but also help make the community a more attractive place to live and work. This in turn improves the utility's ability to recruit and retain highly qualified personnel.

Charitable contributions to local community organizations improve community relations and create goodwill for the public utility. If utilities, like all privately owned corporations, did not provide their fair share of support for such community service organizations, the services provided by these groups would undoubtedly have to be provided (albeit less efficiently) by local government and financed through increased taxes, which would unquestionably be considered appropriate inclusions in the utility's rate base. The fact that the employees of public utilities find these contributions to be of benefit to them is amply illustrated by the fact that in 1986, employees of public utilities individually donated nearly $44 million over and above the $29 million in corporate contributions made to local United Way agencies.

Numerous state public service commissions, including the New York Public Service Commission, appreciating the value of such charitable contributions to utilities and their ratepayers, have authorized such contributions to be included in the utility's rate base. *See, e.g., American Hoechst Corp.* v. *Department of Public Utilities*, 379 Mass. 408, 399 N.E.2d 1 (1980); *Detroit Edison Co.* v. *Public Service Commission*, 127 Mich. App. 499, 342 N.W.2d 273 (Mich. App. 1983). However, beyond permitting a utility to include a portion of its charitable contributions in its rate base, the New York Public Service Commission has absolutely no role in a utility's decision to make any charitable contributions whatsoever, its determination of which charities are "worthy" recipients, or how much a particular recipient may receive (subject to the upper limitations placed on total contributions by the New York Public Service Commission). On those issues, the utility deals solely and directly with the charities it supports. The relationship between a local United Way member and a public utility is no different in any regard from the relationship between a local United Way agency and any other private corporate donor.

Under the standard of review set forth in *Jackson, supra*, the necessary "state action" nexus is wholly lacking. Although we are aware of no case in which this issue has been directly addressed and resolved, this Court has clearly indicated that the *Jackson* standard is the appropriate standard review in deciding this issue. In *Consolidated Edison Co.* v. *Public Service Commission, supra*, the issue raised was whether the New York Public Service Commission could prohibit utilities from including in their billing envelopes controversial messages concerning nuclear power. The majority of the Court held that such a prohibition violated the utility's First Amendment rights, although the majority did not reach the issue of the permissibility of such costs being included in the rate

base if such a practice were permitted. Mr. Justice Blackmun, dissenting on the First Amendment issue, nonetheless set forth the standard of review that would apply if a State had permitted such a practice, and if the practice had been challenged on First and Fourteenth Amendment grounds by individual ratepayers:

> "Of course, a private business does not deprive an individual of his constitutional right unless state action is involved. Although the State has given utilities their monopoly power and thus contributed to a situation in which coerced support of the utility's speech is possible, the state-action requirement of the Fourteenth Amendment may not be met in this situation. *See Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974)." 477 U.S. at 553.

The Court of Appeals' failure to apply the *Jackson* standard requires reversal in this case.

In *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Committee, supra*, this Court recently reaffirmed the distinction, for state action purposes, made in *Jackson*, between the creation of a right and the manner in which it is exercised. There the Court declined to find "state action" in the United States Olympic Committee's exercise of its statutory right to authorize or withhold use of the committee name, stating:

> "All enforceable rights in trademarks are created by some governmental act, usually pursuant to a statute or the common law. The actions of the trademark owners nevertheless remain private. Moreover, the intent on the part of Congress to help the USOC obtain funding does not change the analysis. The Government may subsidize private entities without assuming constitutional responsibility for their actions. *Blum* v. *Yaretsky*, 457 U.S. 991, 1011 (1982); *Randell-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982)." 55 U.S.L.W. 5061, 5067.

The analysis is equally applicable here. Notwithstanding the Public Service Commission's policy, the actions of utilities in making decisions regarding charitable contributions remain private, and therefore state action is not involved.

II. THE COURT OF APPEALS RELIED ON AUTHORITY THAT IS INAPPLICABLE HERE

The Court of Appeals' reliance on *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), is misplaced for two reasons. First, State involvement in that case was so direct and apparent that the threshold question of "state action" did not even have to be raised. Second, *Abood* directly involved a question of subsidization of "the expression of political views, on behalf of political candidates, or . . . the advancement of ideological causes . . . ." 431 U.S. at 235; *see also* App. A5. *Consolidated Edison, supra*, likewise involved the expression of a clear political statement by the utility.

Here, the situation is quite different. As the Court noted in *Consolidated Edison, supra*, the laws of New York preclude a public utility from including in its rate base costs such as political advertising and lobbying. 447 U.S. at 550. The great majority of charities funded by contributions from utilities have nothing to do with "the expression of political views" or "the advancement of ideological causes." Feeding hungry children, providing home services to the sick and elderly, and helping the handicapped learn new job skills, which are among the numerous health and welfare activities funded by local United Way agencies, are what is at issue here.

The fact that the State allows (but does not require) charitable contributions by publicly regulated corporations to such activities as these [1] is the crux of petitioner's

[1] It is noteworthy that Mr. Cahill, petitioner below, did not base his petition solely on the ground that the public utilities in question

complaint below. United Way of America respectfully submits that on the record here, the Public Service Commission's policy of allowing limited charitable contributions is neither "state action" nor the subsidization of political or ideological views, and that the Court of Appeals erred in relying on *Abood*.

CONCLUSION

For the reasons set forth above and in the Petitions of the Public Service Commission, New York Telephone Company, and Central Hudson Gas & Electric Corporation, certiorari should be granted and the decision of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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made charitable contributions to agencies of which he disapproved, but rather that "[p]etitioner objects as a matter of principle to being compelled to support . . . all charities in general, by means of . . . his utility bills . . ." (App. A50).